

BOUNDARIES OF MISSION BAY PARK

SYNOPSIS

The 2000-2001 San Diego County Grand Jury decided to follow up on a recommendation of the 1999-2000 Grand Jury regarding an exact survey to determine the precise dimensions of Mission Bay Park and its leaseholds. This was to be done by the City of San Diego. The Grand Jury also decided to investigate complaints regarding the accuracy of the survey and the implication that the company performing the survey had a possible conflict of interest involving the City and one of the lessees.

Following interviews, reviews of documents, maps, and minutes of the San Diego City Council, the Grand Jury determined that the survey was carried out to the highest degree of practical accuracy. The methodology of the survey was consistent with accepted surveying parameters and approved by federal, state and city agencies.

Concerned citizens, anxious to preserve as much of the public area in the park, contend that wetlands, obviously unsuitable for building and development, should not have been included in the "total land area" from which the 25% "leasable area" is derived.

The contention that a conflict of interest existed could not be supported.

The Grand Jury recommends that all entities contracting with the City of San Diego furnish a Conflict of Economic Interest Statement (FPPC Form 700) as part of their contract agreement.

To address the citizens' concerns the Grand Jury recommends that the San Diego City Council refine the definition of "land" to exclude wetlands in the calculation of land available for lease.

BACKGROUND

Mission Bay Park is one of the most valued recreational assets and tourist attractions of San Diego County. It is for this reason that the citizens of the county have always had a keen interest in its management and preservation. It is for the same reason that the 1999-2000 San Diego County Grand Jury issued an extensive report entitled "*Mission Bay Park-The Truth About 'False Bay'*". This was a wide-ranging report covering several aspects of park management.

The 2000-2001 Grand Jury, being aware of the intense public interest in the Mission Bay Park area, resolved to follow up on one of the items of the previous report-the establishment of an accurate measurement of the entire Mission Bay Park. Special emphasis was placed on the percentage of the area devoted to leasehold improvements. The legal background can be found in the original Mission Bay Park Natural Resources Management Plan (1980) which has since been updated by the Mission Bay Park Master Plan Update of 1994. The 1987 amendment of the City Charter Section 55.1 specifically deals with "RESTRICTIONS UPON COMMERCIAL DEVELOPMENT" in Mission Bay Park (MBP).

The 1987 amendment provides that "the total land and water areas of all leases in Mission Bay Park shall not exceed twenty-five (25%) percent of the total dedicated land area and six and one-half percent (6.5%) of the total dedicated water area, respectively, of the park without such lease being authorized or later ratified by 2/3 of the qualified electors of the City voting at an election for such purpose."

The following were the findings of the 1999-2000 San Diego County Grand Jury:

28. The City has not had a survey to determine land and water acreage of Mission Bay Park nor of leased areas since passage of City Charter Amendment 55.1 in 1987.
29. The City relies on a 1968 aerial survey, which has missing calculations, to determine the total area of Mission Bay Park.
30. The City relies on lessees to provide information of the amount of land included in their lease agreements.
31. In some leases the information about the amount of land is missing or incomplete.

The following were the recommendations of the 1999-2000 San Diego County Grand Jury:

- 00-19:** That the City Manager direct the completion of an accurate land and water survey before any new development of leased land and water is approved to ensure compliance with the City Charter.
- 00-20:** That the City Manager require that the survey determine the extent of marshland in Mission Bay Park.
- 00-21:** That the City Manager determine the total land in the park without including marshland.

00-22: That the City Manager include commercial and non-commercial leases and agreements in the list of properties that are subject to the 25% land and 6.5% water limits in Mission Bay Park.

The following were the responses of the City Manager to the above recommendations:

00-19: This recommendation has already been implemented. . . A competitive selection process has resulted in the selection of Project Design Consultants to conduct this survey. . . City Council authorized the City Manager to enter into a contract with Project Design Consultants on June 5, 2000. . . The survey is expected to be completed by September 2000. However, staff will continue to process requests for new development and lease negotiations at the same time as the survey is being processed. It is likely that the survey will be completed before any new development projects are ready for City Council to review (sic).

00-20: This recommendation will not be implemented because it is not warranted and is unreasonable. A separate calculation of marsh in Mission Bay Park will not provide any relevant information for compliance with Charter Section 55.1. In accordance with standard surveying practices and California law, the mean high tide mark will be used to distinguish land from water (sic).

00-21: This recommendation will not be implemented because it is not warranted and is unreasonable. . . see 00-20 (sic).

00-22: Charter Section 55.1 does not require this change, however, if adopted by City Council as policy direction it will be done (sic).

The purpose of this 2000-2001 San Diego County Grand Jury report was fourfold:

- 1. Completion of survey:**
Was the survey completed as directed by the City Manager?
- 2. Accuracy of the survey:**
Were there any limitations imposed on the surveying company by the City Manager to deviate from generally accepted surveying standards?
- 3. Compliance with the provisions of City Charter Section 55.1 amendment:**
Were the leaseholds of land and water within the limits set by the above?

4. **Conflict of Interest:**

Did the surveyor have any beneficial interest in any of the leaseholds?

Historical Background

Originally, the entire area was marshland deeded to the city by the Tidelands and Coastal Commissions. In 1930, the City of San Diego formulated a plan to create a recreational aquatic park in an area which consisted essentially of tidal mud flats, a racetrack, and some privately owned land.

The boundaries of the tidelands and submerged lands were granted in trust to the City of San Diego by the State of California (Chapter 142 Statutes of 1945). The boundaries of these tideland areas were later revised as a result of a Superior Court decision involving the city, the state, and property owners. (Case No. 84864). This is a static line delineated by the so-called Arnold Line.

Additional land areas, previously held by the California State Parks Department, were granted in trust to the City of San Diego by the legislature.

The above two were augmented by various purchases of land from private property owners and transfers from Caltrans to form the original dimensions of the park.

In 1968, an aerial survey was done and determined the total area of the park to be 4248.93 acres: 1887.02 of land, 2228.18 of water and 133.73 of marshland.

Although several surveys had been conducted by the city since 1968 no metes and bounds survey on the leaseholds had been performed by the City.

As a result of dredging and filling operations, as well as of tidal actions, the original measurements of land and water are no longer representative of the actual state of affairs existing today.

It was important to accurately assess the area of the tidelands since all revenue derived from it must be spent on tidelands.

CITIZENS CONCERNS

The survey was conducted with preconceived parameters which would show the city's leasing practices in a more favorable light.

A survey of wetlands should have been included (This was also recommended by the 1999-2000 San Diego County Grand Jury).

Wetlands were included in the survey as "land" areas to increase the number of acres which can be leased (25% of total land).

The areas of land previously designated were only dedicated to increase the percentage of land on which the city would be able to lease.

Land, which was above the mean high tide mark in the Mission River Flood Channel, was considered as land.

The city tries to maximize leasehold development, at the expense of the public areas, in Mission Bay Park.

Wetlands which are being used for filtration treatment of polluted rainwater runoffs and nature preserves, even though they are above mean high tide levels, are obviously not suitable for leasehold development and should not have been included in the total area of leasable land.

PROCEDURES

The Grand Jury interviewed:

1. Representatives of the City of San Diego
2. An environmental activist as well as a concerned citizen
3. The surveyor

Documents reviewed:

1. City Council Minutes
2. Survey report summary
3. Initial and recent survey maps
4. Mission Bay Park Master Plan (1994 Update)
5. "Recognizing Wetlands-An Information Pamphlet" published by the U.S. Army Corps of Engineers.

All interviewees were cooperative and forthcoming.

FACTS

PERFORMANCE

The Mission Bay Park Survey was completed, as directed, and the final report submitted to the San Diego City Council on March 9, 2001 (Document No. 1654.05).

Preceding the survey, an exacting title search of all the conveyed parcels of land in Mission Bay Park, was performed by Project Design Consultants.

In addition to establishing land and water limits, as well as those of all the leaseholds, a survey to establish the tidelands area was also conducted, since according to California Law, revenues generated by tidelands must be spent on tidelands.

The survey was certified by the Surveyor, accepted by the City Council, and has been recorded as Record of Survey 16891 on February 28, 2001, in the Office of the County Recorder as File Number 2001-011342.

ACCURACY

There were no restrictions placed on the surveyor. They were required to use the most accurate methods presently available.

The mean high water line was used to distinguish land from water. This is the generally accepted standard used by surveyors, defined by California Law and used by California Coastal Agencies.

Two hundred and forty (240) ground control points were placed throughout the park to establish mean high water marks.

Tidal gauges were used to accurately assess the mean high water mark levels. These gauges were specific to this project and independent from those used by the state.

The markers were visible from the air.

Thirty (30) transit flights were made over the area noting the markers on the ground.

This resulted in 250 aerial photographs and 230 stereo models. These photographs were combined into a composite map.

Flights were made at a low altitude of 1000 feet to obtain maximum accuracy.

Weather and visibility were excellent during the transit period.

Aerial surveys were confirmed by ground measurements using the latest and most accurate technology, the Global Positioning System (GPS), including total static theodolite.

National Oceanographic and Atmospheric Administration (NOAA) representatives, State Land Agency representatives and the city engineer were involved in the survey and approved the methodology.

A metes and bounds survey was made of all leaseholds. The language of Section 55.1 of the City Charter speaks of **land** (as defined above) not **usable land** to establish the number from which the 25% of leaseholds are calculated.

Leasehold area calculations include commercial and non-commercial uses (Boy Scouts, Rowing Club, Yacht Club, Athletic Club, etc).

FINDINGS

SURVEY

The total dedicated land area of Mission Bay Park is 1936.69 acres.

The total dedicated water area of Mission Bay Park is 2298.92 acres.

The total acreage of Mission Bay Park is 4235.61 acres (4248.93 acres on the 1968 survey-a difference of minus 13.65 acres).

The area of marshland (wetlands) was not determined from the air as boundaries have to be determined on the ground.¹

The measurement of wetlands is not included in standard surveying procedures (see below).

Survey was done to the highest degree of accuracy possible. The degree of accuracy over the total area was to within ½ acre.

Title search found that there were ten parcels totaling 26.84 acres of the park, which had been designated to be within the park, but for which no record of City Council action of dedication was found. This area had been included in the park

¹ Definition of Wetlands: “those areas that are inundated or saturated by surface or ground water at a frequency or duration sufficient to support, and under normal circumstances do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.” **EPA Regulations at 40 CFR 230.3(t).**

area and maintained by Park staff. The Grand Jury believes that this was a clerical oversight discovered by a competent surveyor and not a deliberate attempt to increase the land area on the part of the City Council. The city corrected this oversight and formally dedicated these 26.8 acres at a regular council meeting on October 8, 2000.

The largest parcel of previously undedicated land was around the visitors' center and includes areas around the picnic tables, the boat ramp, and part of the parking lot.

Retracement and remeasurement of old survey monuments was performed. Assistance of a retired former city employee, who was involved in previous surveys, was of invaluable assistance in finding old monuments.

A metes and bounds survey determined the exact boundaries of the leased land, which had not been previously established.

COMPLIANCE

The survey established that the large commercial leaseholders were in compliance with their leases.

The survey also found that some leaseholders, adjacent to the Park, mainly in the De Anza Trailer Park area had unwittingly encroached on parkland. The City has notified these leaseholders by letter and corrective action has been initiated.

Some leaseholders were found to be entirely within the Park, some were partially in the Park and partially in tidelands, and some were entirely in the tidelands area.

In order to comply with state law directing that income derived from tidelands has to be spent on tidelands, a fair ratio of tidelands to the total area (4%) had to be established.

There are seven non-commercial leaseholders occupying a total of 14.003 acres of land.

The inclusion of non-commercial leaseholds in the total land area for leaseholds is provided for by amended City Council Policy 700-08, Section 55.1 of the City Charter.

Total commercial and non-commercial lease parcel area is 461.595 acres of land. This represents 23.83% of total land area and leaves some 12 acres for any future development (see chart).

The City is within the limits of the 484.725 acres or 25% of total land available for leasehold as provided by Section 55.1 of the amended Charter, ***if the wetlands are included in the total land area*** (see chart).

DESCRIPTION	AREA (ACRES)	
Mission Bay Park		
Park Area by Ordinance Prior to October 2000	4,208.77	
Park Area Dedicated Concurrently with this Report	26.84	
Total Park Area (subsequent to Ordinance 18884)	4,235.61	
Land/Water Areas (subsequent to new ordinance)		
Land Area	1,936.69	
Water Area	2,298.92	
Total Land/Water Area	4,235.61	
LEASE PARCEL AREAS	WATER	LAND
Non-Commercial Lease Parcels	5.906	14.003
Commercial Lease Parcels	89.653	447.592
Total Lease Parcel Areas	95.559	461.595
Acres Available for Lease (With Permit Approval)	53.8708	22.5775
Maximum Permitted Leasehold Areas	149.43	484.1725
LEASEHOLD AS A PERCENTAGE OF AREA		
Percent Leased as Non-Commercial Leaseholds	0.26%	0.72%
Percent as Commercial Leaseholds	3.90%	23.11%
Percent Leased	4.16%	23.83%
Percent Available for Lease (With Permit Approval)	2.34%	1.17%
Maximum Permitted Percentages for Leaseholds	6.50%	25.00%

WETLANDS

The U.S. Army Corps of Engineers uses three characteristics of wetlands when making wetland determinations: Soil conditions, Vegetation, and Hydrology. It is not measurable by standard surveying practices and requires the services of specialists in the various fields (Soil Engineers, Biologists, Army Corps of Engineers) to ascertain the precise extent of wetland areas.

The measurement of the wetlands area was not required by the City in the surveying contract and was not done.

SPIRIT OF THE MASTER PLAN

The spirit of the Master Plan for Mission Bay Park calls for a maximum use of the park for public recreations and enjoyment.

Page 51 of the 1994 Update of the Mission Bay Park Master Plan suggests that **“419.45 acres in dedicated leases should be considered a practical maximum”** (there are, in fact, 461.595 see chart) and creating wetlands **“would raise the dedicated lease percentage”**, implying that the original planners did not consider wetlands as areas which could be considered for development.

Since wetlands are unsuitable for development, in any case, it would, therefore, seem reasonable to subtract the area of wetlands from the total land area available for commercial development.

THE FUTURE

Three parcels totaling 5.6 acres, which are extensions to existing leaseholds, are in the planning stage.

There is a possibility that some Caltrans land (area K on the aerial photograph) of 1.38 acres will be added to the total park area.

When the Trailer Park lease expires on November 3, 2003, some leased land (approximately 17 acres) may revert to public use if they are not leased.

CONFLICT OF INTEREST

The survey contract was awarded after an advertised and competitive bidding process. Qualified bidders did not need to prove expertise in surveying wetlands.

The city did not supply documents that a Conflict of Economic Interest (FPPC Form 700) had been filled out by the surveying company as part of the contract and claims that the company was exempt from doing so.

Another company, which had been contracted to do environmental work for one of the large leaseholders, later merged with the surveying company.

The time of the merger was after the surveying work had been in progress. (Contract awarded in June 2000, merger concluded in October 2000)

There was no change in the area of the involved leasehold as a result of the survey.

The Grand Jury concluded that no conflict of interest existed.

RECOMMENDATIONS

01-128: That the City Manager require that all parties, which have contracts with the City, furnish a Statement of Economic Interest, as part of their contract, to prevent the perception of a possible conflict of interest by the public.

01-129: That the San Diego City Council review and refine the definition of land and wetlands in the calculation of the total land available for

lease in Mission Bay Park within the spirit of the Mission Bay Master Plan Update of February 1994. This can be accomplished by an amendment to the City Charter which refines the definition of wetlands in order that they are not included in the total amount of land available for leasehold development.

- 01-130:** That the San Diego City Council consult with the Natural Resources and Cultural Committee and other groups of concerned citizens who are committed to preserving the maximum of Mission Bay Park for public use.

REQUIREMENTS AND INSTRUCTIONS

The California Penal Code §933(c) requires any public agency which the grand jury has reviewed, and about which it has issued a final report, to comment to the Presiding Judge of the Superior Court on the findings and recommendations pertaining to matters under the control of the agency. *Such comment shall be no later than 90 days after the grand jury submits its report to the public agency.* Also, every ELECTED county officer or agency head for which the grand jury has responsibility shall comment on the findings and recommendations pertaining to matters under the control of that county officer or agency head, as well as any agency or agencies which that officer or agency head supervises or controls. *Such comment shall be made within 60 days to the Presiding Judge of the Superior Court with an information copy sent to the Board of Supervisors.*

Furthermore, California Penal Code §933.05(a), (b), (c), details, as follows, the manner in which such comment(s) are to be made:

- (a) As to each grand jury finding, the responding person or entity shall indicate one of the following:
 - (1) The respondent agrees with the finding
 - (2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.
- (b) As to each grand jury recommendation, the responding person or entity shall report one of the following actions:
 - (1) The recommendation has been implemented, with a summary regarding the implemented action.
 - (2) The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.
 - (3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a time frame for the matter to be prepared for discussion by the officer or head of

the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This time frame shall not exceed six months from the date of publication of the grand jury report.

- (4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.
- (c) If a finding or recommendation of the grand jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the Board of Supervisors shall respond if requested by the grand jury, but the response of the Board of Supervisors shall address only those budgetary or personnel matters over which it has some decision making authority. The response of the elected agency or department head shall address all aspects of the findings or recommendations affecting his or her agency or department.

Comments to the Presiding Judge of the Superior Court in compliance with the Penal Code §933.05 is required from the:

San Diego City Manager

Recommendation: 01-128

San Diego City Council

Recommendations: 01-129, 01-130